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IN THE

Supreme Court of the United States

October Term, 1957

No. 251

PANAMA CANAL COMPANY,

Petitioner,

v.

GRACE LINE, INC., *et al.*,

No. 252

GRACE LINE, INC., *et al.*,

Cross-Petitioners,

v.

PANAMA CANAL COMPANY.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR AKTIESELSKABET DAMPSKIBSSELSKABET SVENDBORG, AKTIESELSKABET DAMPSKIBSSELSKABET "VESTERHAVET", AUSTRALIND STEAM SHIPPING CO., LTD., BLUE STAR LINE, LTD., COMPANIA COLOMBIA DE NAVIGACION MARITIMA, LTDA., COURT LINE, LTD., DAMPSKIBSSELSKABET AF 1912 AKTIESELSKAB, IVARANS REDERI A/S, MARINA MERCANTE NICARAGUENSE, S. A., NEW ZEALAND SHIPPING CO., LTD., PORT LINE, LTD., REDERIET "OCEAN" AKTIESELSKAB, WESTFAL-LARSEN & CO., A/S, AND WILH. WILHELMSEN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND CROSS-PETITIONERS GRACE LINE, INC., *ET AL.*

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Canal Zone Code, Title 2, as amended:

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Amici, representative foreign shipowners, respectfully file this brief with the consent of the parties pursuant to Rule 42, Paragraph 1 of the rules of this Court.

Opinions Below and Jurisdiction

The opinions below and the grounds for the jurisdiction of this Court are correctly stated on pages 1 and 2 of the Panama Canal Company brief.

Questions Presented

Amici are interested in the following two broad questions presented:

1. Does the statutory provision that toll rate changes are to be approved by the President override the Hay-Pauncefote Treaty requirement that tolls be "just and equitable" so as to prevent judicial review of Panama Canal tolls? (Panama Canal Company brief Questions Nos. 1(a) and 1(e); Grace Line, Inc. Petition Questions Nos. 1 and 2).

2. May a public utility (here the Panama Canal Company) avoid liability for past excessive charges because its rates are subject to executive or administrative approval? (Question No. 3 in Panama Canal Company brief; Question No. 4 in Grace Line petition)

Statutes Involved

1. Canal Zone Code, Title 2, Sections 411 and 412, as amended by the Act of September 26, 1950, 64 Stat. 1038.

2. The Hay-Pauncefote Treaty, proclaimed by the President on February 22, 1902, 32 Stat. 1903.

The statutes involved are printed in full on pages 3 through 7 of the Panama Canal Company brief.

Statement

As the Court of Appeals observed (fn. 9) the use of the Panama Canal by foreign shipping has greatly increased. The General Accounting Office 1955 Audit Report shows that the commercial tolls collected have increased as follows:

Tolls Revenue	Foreign Flag	U. S Flag
1955	$23,442,170	$10,407,307
1952	16,935,823	9,986,708

Since canals, like toll highways, operate with rather rigid costs, an increase in volume may be expected to result in lower tolls. This has happened, for instance, at Suez. There, following the post World War II trade activity, Suez Canal tolls were reduced during private operation after 1946 about 40%. In turn the increase in volume at Suez has been greater than at Panama, partly at least due to traffic generated by the lower rates. That the increase noted by the Court of Appeals is continuing is shown by the fact that in 1956 the foreign flag and U. S. flag commercial tolls had increased to $25,410,164 and $10,808,921 respectively.[1]

The foreign policy of the United States is in favor of international trade as a means of promoting international communication, without which there can be no international cooperation.

Amici are concerned with suggestions that as aliens they have no standing to question the President's performance of his discretionary duties. That question is not in this case. Here the President has taken no action; he has been unable to act because there have been no hearings as

[1] Panama Canal Company report for fiscal 1956, pp. 47, 63.

to toll rates since the act of September 26, 1950. Nowhere has the Canal Company been able to find authority for its point that toll rates considered "just and equitable" in 1950 are, entirely absent economic proof, to be considered without judicial review "just and equitable" in 1958.

POINT I

Charging non-Canal losses against Canal operation for tolls-fixing purposes deprives the Canal users of the lower toll which would otherwise result and is contrary to the progressive public policy of trade, not aid.

The opinion of the Court of Appeals and the briefs of the plaintiffs have demonstrated beyond doubt that Section 412(b), Title 2, of the Canal Zone Code,[2] as shown both by language and legislative history do not contemplate that Canal operation be burdened, or affected, by non-Canal activities. Yet the Panama Canal Company, as shown by the Audit Reports of the General Accounting Office, has deprived Canal users of the benefits which the Canal users would otherwise receive by loading on Canal operations the losses of these other activities.

The result is unfair to Canal users and unlawful under the laws of the United States. It is moreover a most unfortunate precedent to set for other nations, many of which are under far greater pressures than the United States to exploit for purposes of national policy assets properly dedicated, like the Panama Canal, to the welfare of the world community.

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[2] Printed in Panama Canal Company brief at pp. 4-5.

POINT II

Presidential discretion is not involved in this case.

The Act of September 26, 1950, established a formula whereby Panama Canal tolls were to be based on canal operating costs, including a proportion of the costs of the Canal Zone Government, but excluding the costs, and necessarily also the profits, if any, of the non-canal activities, such as the hotels, commissaries, railroad, etc. The tolls were to be reviewed at hearings at which these defined canal operating costs were to be presented according to the regular administrative procedure, and the toll changes were to be subject to presidential approval. But no hearings have been held. In 1953 Congress directed the Panama Canal Company to complete its current study regarding the adequacy of the Canal tolls.[3] The Company replied that it had the matter under study and that it would propose new toll rates, as the Panama Canal Company brief admits, "whenever it should conclude that changes in rates were indicated and necessary".[4] Thus it has been the decision of the Canal Company, not of the President, to maintain the current rates, and the Company has been primarily concerned with raising tolls, not with having the tolls reflect operating costs.

In any event fixing Panama Canal tolls does not involve the exercise of the executive function as does the assignment of airline routes. By the Hay-Pauncefote

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[3] Page 17, Panama Canal Company brief, fn. 39, see Statement of the Managers on the Part of the House, accompanying the Conference Report on the Civil Functions Appropriations Bill, H. Rept. 889, 83rd Cong., 1st Sess., p. 10.

[4] Page 18, Panama Canal Company brief, A1995, fn. 40, 100 Cong. Rec. (Daily Ed.), printed in appendix to Panama Canal Company brief at pp. 173-176.

Treaty the United States adopted as the basis for the neutralization of the canal that the canal should be open to all on terms of entire equality without discrimination and with just and equitable conditions and charges.[5] Thus approval of tolls is an administrative and ministerial act, not an act involving executive election such as is involved when the President first negotiates an international agreement for an airline route (Cf. *Chicago & Southern* v. *Waterman*, 333 U. S. 103, relied on by the Canal Company) and then allocates this route to an American airline. There a choice must be made between one of several applicants. Under the international agreements usually only one carrier can be chosen, and discrimination is mandatory. Our laws require in assigning routes a personal choice by the President in the interests of national policy to protect the best interests of American airlines, while, as forcefully stated by Senator Elihu Root, we have renounced Panama Canal tolls as an item of national policy. We covenanted to advance world civilization rather than to promote American interests.[6] We also relinquished the internal economic considerations relied on in the argument propounded on pages 34 and 68 of the Panama Canal Company brief.

Both the President and the toll hearings are limited as to the evidence to be considered to Canal operating costs, plus a share of the cost of the Canal Zone Government. The relative welfare of American, Canadian or Mexican transcontinental railways, the economic differentials of trade to Atlantic as against Pacific ports, or the promotion of American exports are all excluded because, by treaty and statute the United States is bound to have tolls reflect costs and to have tolls uniformly applied to all ships in all trades. Preferential treatment to nations or to commodities is prohibited.

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[5] 32 Stat. 1903, Art. III, printed in Panama Canal Company brief at pp. 6-7.

[6] 46 Cong. Rec. 1822.

To excuse the Company's failure to comply with the treaty and statute under the guise of absence of judicial review is to surrender the present leadership the United States enjoys among nations observing their international obligations.

POINT III

The United States treaty obligations in the Hay-Pauncefote Treaty require that damages for the Panama Company's disregard of law and consequent collection of excessive tolls should be awarded Canal users, certainly as that treaty was implemented by the Act of September 26, 1950.

The Hay-Pauncefote Treaty, expressly modeled on the Constantinople Convention of 1888, calls for "just and equitable charges".[7] Clearly this means that if unjust and inequitable charges are collected, the excess should be refunded.

Even more clearly Courts here are traditionally the arbiters of what is "just and equitable". To relinquish this function to the executive would be an unfortunate international example.

By the Act of September 26, 1950[8] Congress explicitly defined "just and equitable". That definition was in no way remarkable: it provided for a toll sufficient to pay costs of operations and a return on investment measured by historical cost.

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[7] 32 Stat. 1903, Art. III, printed in Panama Canal Company brief at pp. 6-7.

[8] 64 Stat. 1038, printed in Panama Canal Company brief at pp. 3-6.

That Act also transferred the Canal to a corporation fully subject to suit and incorporated the "just and equitable charges" provision of the Hay-Pauncefote Treaty in the laws of the United States (Section 12, Amending Section 412(d), Title 2, Canal Zone Code).

It is well-settled in Anglo-American jurisprudence that the user of a public utility who is charged an excessive rate is entitled to reparation in the amount of the excess. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 436.

Accordingly the duty of restitution which would formerly have been a matter of international negotiation is now judicially enforceable in the courts of the United States.

To deny relief for past over-charges on the ground that there was no way of telling how the President would have exercised his Section 411 review power imputes to the President an extra legal function not called for by this legislation. To construe the Act of 1950 as authorizing the President to abrogate rather than enforce its policy is inconsistent with the basic concepts of the language of the statute, the legislative history and the Constitution.

There is no provision for discrimination in toll rates between ships of different nationalities. The President is given no power to retaliate, as far as Panama Canal tolls are concerned, against any foreign action. Such activity is reserved to other spheres. Consequently, policies involving air line routes and tariffs do not apply.

CONCLUSION

The decision of the Court of Appeals should be affirmed in so far as it requires the Panama Canal Company to proceed to recompute tolls and reversed in so far as it denies damages for past excessive charges.

Respectfully submitted,

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